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IN THE

Supreme Court of the United States

OCTOBER TERM. 19

No. 318

W.R.B. CORPORATION, ET AL, d b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE; J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,

Petitioners

v.

ODELL GEER, d/b/a ODELL GEER COMPANY, AND B. H. (BERT) CAMP, d/b/a B.H.C. MATERIALS COMPANY,

Respondents

PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RULE OF PROCEDURE:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19____

No. _____

W.R.B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR AND FIVE,
Petitioners

v.

ODELL GEER, d/b/a ODELL GEER COMPANY,
Respondent

v.

J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,
Petitioners

AND

W.R.B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR AND FIVE,
Petitioners

v.

B. H. (BERT) CAMP, d/b/a B.H.C. MATERIALS COMPANY,
Respondent

v.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,
Petitioners

PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS W.R.B. Corporation; WME, Inc.; WMI, Inc.; WMEK, Inc.; Paul Investment Co., Inc.; Helen Investment Co., Inc.; Nelson Gardens, Inc.; WRH Corporation; Saymax Investment Corporation; WMIK, Inc.; WRJ Corporation; Sayell Investment Corporation; Sayirv Investment Corporation; WRM Corporation; Sayman Investment Corporation; Boharl Investment Co.; Anna Investment Co., Inc.; Allied Builders; Bonded Building Company; Cal-Tex Co.; Don Construction Co.; E-J Contractors, Fort Hood Housing Corporations Nos. One (1), Two (2), Three (3), Four (4), and Five (5); J. E. Riley & Son, Inc.; Massachusetts Bonding and Insurance Company; and Republic National Bank of Dallas, pray that writs of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in two cases (1) W.R.B. Corporation, et al v. Odell Geer, d/b/a Odell Geer Company; (2) W.R.B. Corporation, et al v. B. H. (Bert) Camp, d/b/a B.H.C. Materials Company, consolidated in the Trial Court and on appeal in the Fifth Circuit.[1]

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[1] Two cases are consolidated for this petition. Motion to Consolidate the Record on Appeal and Order of Court Consolidating Record on Appeal appearing as Appendix A. Both cases, referred to in the opinion of the Fifth Circuit as the "Geer case" and the "Camp case" involve suits instituted by an "eligible builder"—Petitioner Robertson Construction Company, a trade name for some seventeen corporations associated as joint ventures with some five associated corporations, under the Capehart Housing Act (69 Stat. 635) against sub-contractors Geer and Camp. Geer and Camp joined issues with Robertson's complaints and filed counter-claims and cross-actions against the eligible builder's bonding company (Massachusetts Bonding and Insurance Company) and the escrow agent used in

Citations To Opinions Below

The opinion of the Fifth Circuit Court is unreported and is printed as Appendix B, hereto, infra, p. 20; the judgment of the Fifth Circuit is printed as Appendix C, hereto, infra, p. 22. The opinion of the Circuit Court of Appeals, Appendix B, is the second opinion written by that Court, the case having been appealed twice. The first opinion written by that Court vacating and remanding the judgment of the District Court, is printed as Appendix D, hereto, infra, p. 24. The opinion of the Circuit Court of appeals on the first appeal is printed in Appendix D, hereto, infra, p. 24, is reported in 313 F. 2nd 750.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 20, 1964, p. 22, infra. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

Have the Petitioners been denied rights protected by the due process element of the Fifth Amendment, U. S. Constitution and Rule 53(b), Federal Rules of Civil Procedure when the judgment here entered against them was on the basis of a report filed by a

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the Capehart closing (Republic National Bank of Dallas, Texas). Volume 1 of the accompanying record is the record on second appeal to the Fifth Circuit and volumes 2 through 5 constitute the record on the first appeal.

special master appointed by the Trial Court, after the Trial Court referred the cases initially to a master, before whom the cases were tried in toto, but who died before findings of fact were reported, or did the Trial Court err in not ordering a trial de novo before the special master, himself, or a new master after it was determined that controverted fact issues existed so as to give the Petitioners the benefit of full, judicial hearing on all the evidence.

Provisions of the U. S. Constitution Involved

The constitutional provision involved here is the Fifth Amendment, and is printed in Appendix E, infra, p. 32.

Rules of Procedure Involved

The Federal Rule of Civil Procedure involved here is Rule 53, and is printed as Appendix F, infra, p. 33.

Statement

Both the Geer and the Camp cases, consolidated, were referred to the Honorable Jack Walker as master under a Rule 53, appointment (R. 72, 169) and both cases were tried in toto before that master (R. 194, 1085). He heard all of the witnesses, passed upon the authenticity of the documentary evidence, and requested and received trial briefs by all adverse parties (R. 1158); however, before the master was able to file his findings of fact and

conclusions of law (Rule 53(e), Fed. Rules of Civil Procedure) he became incapacitated and died shortly thereafter.

Whereupon, the Trial Court appointed the Honorable Tom Conway as successor master ("Special Master") who caused to be prepared and filed his report, a draft of which was sent to counsel (R. 2). Petitioners objected to certain proposed findings (R. 75). A hearing was held before the Trial Court on the proposed findings of the special master, at the termination of which hearing, the Trial Court overruled all objections by Petitioners to the proposed findings of the special master, sustained the objections of Respondents to some of the proposed findings, and entered judgment against Petitioners. (R. 104, 1121).

On the first appeal of the cases (also consolidated), the United States Court of Appeals, Fifth Circuit, rejected the position of Petitioners as set out in their briefs there, that they had been denied certain constitutionally protected rights and that the tests under Rule 53 had not been complied with, but, nevertheless, vacated and remanded the causes to the Trial Court, without "assay(ing) the correctness of any of the findings or conclusions of law by the master. . . ." Appendix D, infra, p. 24.)

On the second hearing, the Trial Court rejected the request that a trial de novo be had before the Court, another master, or some duly constituted superintendent, at least with regard to the controverted facts issues (R. 36), heard argument of counsel

(R. 16, et seq.), overruled Petitioners' contentions and entered an identical judgment against Petitioners as was previously complained of. Once again, the case was appealed, and affirmed on the theory that the Trial Court had correctly applied the "clearly erroneous standard in the review of the findings of the master" under Rule 53(a)(2); the Court of Appeals made no mention of points originally assigned that Petitioners had been denied rights protected by due process. Appendix B, infra, p. 20.

Reasons for Granting The Writ

1. The decision of the Court below in the instant case as it now stands, is in direct conflict with the decision of the Seventh Circuit case of *Smith v. Dental Products Co.*, 168 F. 2nd 516. The opinion in the Smith case is reported in full as Appendix I, infra, p. 42. In the Smith case, the Trial Court had referred the cause to a master to take and report an accounting as to profits and damages for infringment of plaintiff's trade-marks. The master there heard evidence but died before making any findings or report. The Circuit Court, in holding the entire proceedings thereafter conducted, a nullity, stated:

> "We are confronted with another serious question, that is, the effect of the master's death before he had made a report. The evidence was controverted; several hearings were had, controverted testimony was submitted and the master himself remarked that the status was such that he might require the submission of

further evidence. In other words, the master's judgment upon the credibility of the witnesses appearing, we can never know. The rules contemplate that the District Court shall approve the findings of the master 'unless clearly erroneous', but what the master thought about the witnesses, what he could have found as a matter of fact as to the verity of the testimony, matters which are part and parcel of the purpose of the reference to the master to make findings and report to the court, are absent, and the reference so far as legal effect is concerned, is a nullity.

"Nor did the District Court see the witnesses. In Buchsbaum & Co. v. Federal Trade Commission, 7 Cir., 153 F. 2nd. 85, 87, this court dealt with a similar situation. There a trial examiner of the Federal Trade Commission died before rendering his decision. We said: 'The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available for that purpose, * * * Here there is no claim by anyone that the witnesses were unavailable, and counsel has cited no decision of our Supreme Court which in any way abrogates the ruling in the Ohio Bell Telephone case (Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093) and the Morgan case (Morgan v. United States, 304 U.S. 1, 58 S. Ct., 773, 82 L. Ed. 1129), supra, both of which cases hold that a failure in this respect would amount to failure of due process.' The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have

a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard. In Morgan v. United States, 298 U.S. 468, at page 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288, the court said: 'There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (265 U.S. 274, 44 S. Ct. 565 68 L. Ed. 1016). Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.' See also in re Rubin and Lipman, D.C., 215 F. 669; McAllen v. Souze, 24 Cal. App. 2d 247, 74 P. 2d 853; People v. Lewe, 383 Ill. 549, 50 N.E. 2d 577; Wainright v. P. H. and F. M. Roots Company, 176 Ind. 682, 97 N. E. 8; Labonte v. Lacasse, 78 N. H. 489, 102 A. 540; Hawley v. Priest

> Rapids Ice & Cold Storage Co., 172 Wash. 71, 19 P. 2d 400. We think it was the duty of the District Court, in the absence of findings and report from the Master, in order to afford the parties a hearing within the recognized legal meaning of that word, to direct the trial de novo before another master or before itself."

This conflict is further compounded by an earlier decision by the D.C. Circuit Court, *D.M.W. Contracting Co. v. Stolz*, 158 F. 2nd. 405 (cert. den. 330 U.S. 839), where the intermediate appellate court held that the report of a successor master, appointed after the death of the original master before whom the evidence was taken, may be given the same effect as the report of a master before whom the entire proceedings took place, the court stating in justification for this conclusion,

> "(T)he parties ought not to be put to the unnecessary expense of resubmitting their evidence, but should be permitted to use the evidence already present." 158 F. 2nd at 407.[2]

Whether the court below here or in the Smith case or the court in the D.M.W. case is correct is

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[2] The *ratio decidendi* of the court in the D.M.W. case brings to mind the language of this court speaking through Justice Cardozo in a similar case (quoted and relied on by the court in the *Smith v. Dental Products* case): "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored . . . There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such." *Morgan v. U.S.*, 298 U.S. 468 at 480.

for this court to decide. The court in the D.M.W. case bottomed its decision in considerations of expendiency; the court in the present appeal did likewise. The court in the Smith case bottomed its decision in multiple considerations of due process and the wording of Rule 53. Petitioners' opinion is that the holding of the Smith case should control, for the reasons set out therein.

2. Petitioners' property is taken by the present judgment without the due process protections provided for in the Fifth Amendment. Implicit in due process is the full and fair hearing requirement. The full and fair hearing test is not met, absent conformity with the traditional prerequisites for such proceedings, proceedings in which evidence is received under established rules, weighed by an independent superintendent, and facts found uninfluenced by extraneous considerations. Different cases focus on varying shades of these same due process compulsions in multicolored language: *Buchsbaum & Company v. F.T.C.* (153 F. 2nd 85) speaks in terms of "rule of confrontation" and "observing the demeanor of the witnesses;" *Smith v. Dental Products* (168 F. 2nd 516) teaches the lesson in terms of "judgment (of the trier of the facts) upon the credibility of the witnesses appearing", or "what (the trier of facts) thought about the witnesses", or "what (the trier of the facts) would have found as a matter of fact as to the verity of the testimony", or "a right of the parties to have a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard";

Morgan v. U. S. (298 U. S. 468) mentions "(tradition of judicial proceedings) in which evidence is received and weighed by the trier of facts", and "(a hearing) designed to afford the safeguard that one who decides shall be bound in good conscience to consider evidence", and "(that the trier of the facts) shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action". Here Petitioners will never know the disposition made by the master of the numerous objections carried along with the trial for tardy determination, the judgment of the master on the credibility of the many expert and non-expert witnesses appearing, what the master thought about the witnesses as that requirement dove-tails into the "clearly erroneous" requirement of the reference rule, or what considerations would have influenced him in crystalizing the facts to be reported.[3]

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[3] The rule that someone must decide the admissibility, credibility, and supervise, finds expression in many state cases, including, In re Guardianship of Sullivan, 143 Cal. 462, 77 p. 153; *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N.E. 8, 14; *Hawley v. Priest Rapids Ice & Coal Storage Co.*, 172 Wash. 71, 19 P. 2nd 400; *McAllen v. Souza*, 24 Cal. App. 2nd 247, 74 P. 2nd 853; *Crow v. Industrial Commission*, 104 Utah 333, 140 P. 2nd 321 ("Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a 'full hearing' to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying . . . must either participate in the

3. The "clearly erroneous" test of Rule 52 (a), has not been correctly applied (and cannot be realistically applied) when the master before whom the case has been tried in toto does not find the facts, and the judgment of the court below to the contrary is incorrect.

Rule 52 contemplates that the Trial Court shall approve the findings of the master "unless clearly erroneous", (Appendix F, infra. p. 33) but it is not possible (as suggested in *Smith v. Dental Products*, supra.) to apply this test where the person reporting his fact findings, did not preside at the trial for

> ". . . what the master thought about the witness, what he would have found as a matter of fact as to the verity of the testimony, matters which are part and parcel of the purpose of the reference to the master to make findings and report to the court, are absent, . . ."

Rule 53 empowers the master to regulate the proceedings before him; Rule 53 empowers the master before whom the case is tried to take all measures necessary for the proper performance of his duties and the orderly disposition of the trial. *Connecticut Importing Co. v. Frankfort Distilleries*, 42 F. Supp. 225; *Cold Metal Process v. United En-*

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decision, or where, at the time the decision is rendered, he has severed his connections with the . . . fact-finding body, the record must show affirmatively that the one who finds the facts had access to the benefit of his findings, conclusions and impressions of such testimony, either written or oral reports thereof").

gineering, 92 F. Supp. 969. As noted above, the credibility of witnesses testifying before the master is for the master to determine (*Boone v. Equitable Holding Co.*, 32 F. Supp. 896, reversed on other grounds, *Beckley National Bank v. Boone*, 155 F. 2nd 513, cert. denied, *Boone v. Equitable Holding Co.*, 313 U.S. 558). The rule (Rule 53(c)) expressly contains the provisions that the master may (as was done here) require the production before him of evidence on all matters embraced in the reference, including the production of books, papers, documents, and other applicable writings. The same section of the rule provides that the master may rule on the admissibility of evidence (unless the order of reference provides to the contrary). It is true that a master to whom a reference has been made acts in an advisory capacity, and his report is advisory only, but it is equally true, that the court does not have the right to reconsider, weigh, and evaluate evidence to arrive at its own independent conclusions and the court may not refuse to recognize the master's findings or escape the conclusion to which the findings lead, merely because of a difference in personal persuasion on the evidence, or a dissatisfaction with the result reached, for the admissibility, credibility, etc., as to the evidence is within the peculiar cognizance of the master. *Krinsley v. United Artists Corp.*, 225 F. 2nd 579; *Sanitary Farm & Gammel*, 195 F. 2nd 106; *Leader Clothing Co. v. Fidelity & Casualty Co. of N. Y.*, 237 F. 2nd 7 ("It is the general rule that where a master has been appointed under Rule 53 (e) his findings should not be disturbed merely because the Trial

Court is of a different opinion or dissatisfied with the master's findings" at p. 11 of 237 F. 2nd).

Findings of the master based on oral testimony where credibility is involved are favored by the courts and are entitled to great weight, since the master had the opportunity to see and observe those who testified. *Helene Curtis Industries v. Sales Affiliates*, 121 F. Supp. 490 (affirmed, 233 F. 2nd 148, and certiorari denied in 352 U.S. 879).

It is difficult to reason with the court below in view of the role played by the master under a Rule 52 reference. The absence of a finding of fact filed by the hearing master eviscerates the entire proceedings and no alternative remains but re-trial of the controverted fact issues. Because this inherent defect exists in the present proceedings, Petitioners have been relegated throughout both appeals to an impossible burden, that is, to secure a "review" of evidence by points involving credibility, weight, etc. See Appendix G, infra., p. 38 for points of error assigned on the first appeal in No. 19,952, on the docket of the Court of Appeals and Appendix H, infra., p. 39 for points of error assigned on second appeal in No. 20,999. Petitioners' efforts were foredoomed, for what Petitioners have been crying out for is what the courts could not give under the present posture of the case, that is, that the conflicting testimony be weighed and be resolved in its favor, that the competency of its expert witnesses be given more force than those experts offered by Respondents, and that proper evaluation be made of all relevant factors. No amount of reading of the record

in this case could supply the successor master or the Trial Court with the raw materials for the application of a "clearly erroneous" review.

4. The question here presented is of great importance in the administration of the reference-to-a-master rule. Increasing use of Rule 53 for trial in government contract (and other) cases will give rise to instances similar to those present here, that is, that the master dies or becomes disabled prior to filing his report. The books already indicate that the courts have not resolved this problem area consistently. The time is ripe for this court to insure consistency and fairness of treatment to all concerned in like situations.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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On this the 22 day of July, 1964, two copies of this Brief were mailed to (1) Honorable Lee Curtis, Curtis, Duncan and Bragg, Belton, Texas, (2) Honorable Emory Camp, P. O. Box 552, Cameron, Texas, and (3) Honorable David Bragg, of Curtis, Duncan and Bragg, Killeen, Texas.

Robert C. Howell

ROBERT C. HOWELL

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

(Filed in Clerk's office June 16, 1962)

CIVIL ACTION NO. 2122

W. R. B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY, AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE,

Plaintiffs

V.

ODELL GEER, d/b/a ODELL GEER COMPANY,

Defendant and Cross-Plaintiff and Third Party Plaintiff

V.

J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,

Third Party Defendants

and

CIVIL ACTION NO. 2125

W.R.B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR AND FIVE,

Plaintiffs

V.

B. H. (BERT) CAMP, d/b/a B. H. C. MATERIALS COMPANY,

Defendant and Cross-Plaintiff and Third Party Plaintiff

V.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND
REPUBLIC NATIONAL BANK OF DALLAS,
Third Party Defendants

Motion to Consolidate the Record for Appeal

Comes now the counsel for both parties in each of the above entitled and numbered causes, and move the Court to consolidate the record in the said causes for appeal purposes.

/s/ Robert C. Howell

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/s/ Lee Curtis

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(Caption omitted)

) CIVIL ACTION NO. 2122
)
) CIVIL ACTION NO. 2125

Order of Court Consolidating Record on Appeal

It appearing to this Court that the motion for consolidation of the record for appeal purposes

would expedite the appeal in these cases, and having been approved by counsel for both parties of record.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that the record in Cause No. 2122 and Cause No. 2125 be consolidated for the purposes of appeal.

Done at Austin, Texas, this 15th day of June, 1962.

/s/ Ben H. Rice, Jr.

United States District Judge

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 20999

W. R. B. CORPORATION ET AL d/b/a ROBERTSON CONSTRUCTION COMPANY, AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE; J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BAND OF DALLAS,

Appellants,

versus

ODELL GEER, d/b/a ODELL GEER COMPANY, and B. H. (BERT) CAMP, d/b/a B. H. C. MATERIALS COMPANY

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(May 20, 1964.

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

PER CURIAM: On its former appearance in this Court, *W.R.B. Corp. v. Geer*, 5 Cir., 1963, 313 F.2d 750, we remanded this case because the District Judge had not properly applied the clearly erroneous standard in the review of the findings of the special master. F.R.Civ.P. 54(e)(2). Our reconsideration on the briefs and argument and the record made by

the District Judge on remand reveals two things without question. First, on remand the District Court carefully applied the correct legal standard which we epitomized in our former opinion. Second, applying those standards, there was ample basis for sustaining the Special Master's findings. No point would be served by discussing each of these items or the evidence pro and con on them. There was conflict and the Special Master resolved it. There is ample basis for his resolution.

That leaves only the question of law as to whether the District Judge could disregard the findings of the Master relating to the effect of certain releases. We agree with the District Court that under the controlling Texas cases e.g., *Oviett v. Warner*, Tex. Comm'nApp., 1926, 288 S.W. 434; *First Texas Prudential Ins. Co. v. Conner*, Tex.Civ.App., 1919, 209 S.W. 417, the releases lacked legal consideration to support a discharge of the particular items allowed by the Master. This being true, the Master's findings relating to the releases were clearly erroneous if findings of fact, and were clearly wrong if conclusions of law. In either event the District Judge properly set them aside.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1963

No. 20999

D. C. Docket No. 2122 and 2125 Civil

W. R. B. CORPORATION, ET AL d/b/a ROBERTSON COMPANY, AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE; J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,

Appellants,

versus

ODELL GEER, d/b/a ODELL GEER COMPANY, and B. H. (BERT) CAMP, b/d/a B. H. C. MATERIAL COMPANY,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged by this Court that the appellants, W.R.B. Corporation, and others, d/b/a Robertson Construction Company, and Allied Builders, and others, and Fort Hood Housing Corporations Nos. One, Two, Three, Four, and Five; J. E. Riley & Son, Inc., Massachusetts Bonding and Insurance Company and Republic National Bank of Dallas, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 20, 1964

Issued as Mandate:

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19952

W.R.B. CORPORATION, ET AL., d/b/a ROBERTSON CONSTRUCTION COMPANY, ET AL.,
Appellants,

versus

ODELL GEER, d/b/a ODELL GEER COMPANY; and B. H. (BERT) CAMP, d/b/a B. H. C. MATERIALS COMPANY,
Appellees.

Appeal from the United States District Court for the Western District of Texas

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(January 30, 1963)

Before HUTCHESON, BROWN and WISDOM, Circuit Judges

BROWN, Circuit Judge: These two cases growing out of a large government construction project were consolidated for trial, but the entry of separate judgments. In each of them, the Contractor sued the Subcontractor to recover alleged overpayments made to the Subcontractor. In each the Subcontractor filed a counterclaim against the Contractor. In the final judgment in each case the Contractor recovered nothing whereas each of the Subcontractors obtained a substantial recovery for additional sums. The Contractor appeals in each case. The appeals have been consolidated. All of the contentions of the Contractor as Appellant arise out of the fact that the cases were referred to and tried and determined by a Master.

Because these claims and cross claims presented a great number of controversies growing out of specific provisions of the various contracts, subcontracts, work, service and materials furnished thereunder, the District Court without objection to any of the parties concluded that it was one properly before trial before a Master under F.R. Civ. P. 53(b). The order in each found "that this is a case in which the issues are long and complicated, and * * * is a matter of account * * *." The Master was ordered to "take evidence and ascertain the amounts of damages, if any sustained by any of the parties * * *" and to "* * * report his findings and conclusions to this Court * * *." The parties shortly proceeded to extensive hearings be-

for the Master. The hearings lasted about seven days, and the record of the testimony and other proceedings covers over 1,000 pages. In addition the original exhibits sent up with the record number approximately 120 and run another 2,000 sheets or so. Upon the completion of the evidence, the parties submitted written memorandum briefs and arguments to the Master. But before the Master had an opportunity to pass upon the issues and render his report (as the order called for), he became incapacitated by acute illness from which he never recovered. The District Court thereupon entered an order appointing a successor Master. This order provided that the successor Master was "appointed as Special Master wit' all of the powers granted to the * * *" original Master. It was further ordered the the successor Master "shall make a report to this Court of his findings of fact and conclusions of law based upon the evidence heretofore taken by the [original Master] and upon the record of such evidence with the power, however, to take any further evidence which [the successor Master] may deem necessary." No objection was made by any party to the appointment of a successor Master, the entry of this order, or any of its terms. Specifically no objection or exception was taken to the provision that the successor Master should determine the controversy on the basis of the existing record. Although the order allowed the taking or retaking of further testimony, neither party offered any additional evidence, nor was any request made that hearings for such purpose be held.

The successor Master, after consideration of the existing record—including the memorandum briefs and arguments previously filed—took the case under advisement. Several months thereafter he rendered a separate report in each case containing detailed findings of fact and conclusions of law. To each report the Contractor (the present Appellant) filed numerous detailed exceptions. These generally attacked the specific findings because not supported by sufficient or any evidence and because such findings were clearly erroneous. They were also amplified by specific request for additional findings, conclusions of law, or both. No exception or objection was urged that the successor Master had reached his conclusions based upon the prior record. Nor was there any exception or objection that the successor Master should have heard any part, or all, of that testimony again through the personal appearance of the witnesses before him. Likewise, there was no exception or objection as to any procedural action, or non-action, on the part of either the original or successor Master.

The District Court thereafter held a hearing on the exceptions to the Master's report. This was attended by counsel and the successor Master. The Court sustained certain exceptions urged by the Subcontractors in one of the two cases. But other than this the Court, by formal order, subsequently overruled all exceptions filed by the Contractor. It bears repeating that at no time prior to the entry by the District Court of the order confirming the reports (except as modified) of the successor Master was objection or exception ever made by the Ap-

pellant either to (a) the case being referred to the successor Master, or (b) to his consideration and determination of the controversy on the basis of the initial existing record. Indeed no such objections were made at any time prior to the filing of the briefs in the consolidated appeals in this Court.

As we are certain that this careful and experienced trial Judge would have made appropriate provisions for the appearance or re-appearance of any critical witnesses for oral examination or re-examination before the successor Master had either one or both of the parties made this known to the Court or informed him of circumstances indicating that this was advisable or necessary, there is no basis for the belated charge now made before us that the District Court erred in not requiring a complete or partial rehearing of the evidence before the successor Master. We can therefore accept *Smith v. Dental Products Co.*, 7 Cir., 1948, 168 F. 2d 516, urged by the Appellant, without determining whether there is really any substantial conflict between it and *D.M.W. Contracting Co. v. Stoltz*, D.C. Cir., 1946, 158 F. 2d 405.

However, while we reject this basic contention and others related to it, we are unable at this time to affirm the judgment outright. A consideration of the record leaves us in doubt that the District Judge gave that review of the record and the successor Master's report which the law requires.

Under F.R. Civ. P. 53(e)(2), the trial Court, in an action tried without a jury, "shall accept the

master's findings of fact unless clearly erroneous." Of course, it is precisely because the findings come with such formidable support, that a Court at some stage must determine as a judicial matter that the findings meet that test and are the product of correct principles of law.

But in this record and from the extended colloquy between the Judge and the Contractor's counsel on the hearing of the objections to the successor Master's report, we gain the impression that the trial Judge did not consider that he had the task here of subjecting the reports to this test. In the first place he repeatedly spoke in terms of "substantial evidence." Were this standing alone we would think that this was merely the Judge's shorthand reference to "clearly erronous." But it does not stand alone. For in this very protracted exchange, it is apparent to us that the Judge put an interpretation on counsel's concession which counsel did not mean to imply even though each was using the same term "substantial evidence." When counsel finally stated that as to the various findings excepted to there was "substantial evidence," the Court announced, "with the admission that there is substantial evidence to support the Master's findings, I am going to let them stand. I will overrule your objections." But it is plain to us that counsel used this expression merely to acknowledge the existence and identification of testimony or exhibits offered in support of the findings. His arguments, each time, were in terms of opposing evidence which, he claimed, made the Master's findings insupportable.

In view of this we cannot indulge any assumption that the Judge was using "substantial evidence" as the equivalent of "clearly erroneous." To pass that test the evidence must, of course be substantial. But unlike the Judge's function in passing on the sufficiency of the evidence in a jury case, it does not end there. As does the appellate Court in reviewing like findings of a District Court, the clearly erroneous concept of F.R. Civ. P. 52((a) requires findings to be set aside if the Court is left with the impression that the result is not the truth and right of the case. In this sense, at least, the two terms are not synonymous, and the Judge had the obligation to determine that this record and the attacked findings satisfied that meaning as well. 2B Barron & Holtzoff, Federal Practice & Procedure §1135 (Wright ed. 1961) citing this Court's decisions in *Sanders v. Leech*, 5 Cir., 1946, 158 F. 2d 486; *United States v. Kaplan*, 5 Cir. 1960, 277 F. 2d 405; *Manufacturer's Cas. Ins. Co. v. Instrusion-Prepakt, Inc.*, 5 Cir. 1959, 264 F. 2d 758; *Slattery Co. v. United States*, 5 Cir., 1956, 231 F. 2d 37; *Western Cotton-oil Co. v. Hodges*, 5 Cir., 1955, 218 F. 2d 158.

Of course in carrying out this vital judicial duty a Court is entitled to the assistance of counsel in pinpointing both the specific issues under attack and the relevant portions of the record demonstrating the asserted presence or absence of evidence. But essential as is a Court's dependence on counsel it cannot escape the judicial travail incident to the objections by putting the burden on counsel alone.

To assure that the Judge has fulfilled that judicial function, the final judgment must be vacated and

the causes remanded for such determination of all the objections to the Master's report which were raised and pending by any or all of the parties. In view of this approach, we have not undertaken to assay the correctness of any of the findings or conclusions of law by the Master. We intimate no opinion on them.

We do not undertake to blueprint the proceeding on remand before the District Court, but quite obviously the Court in entitled to call on counsel for further written memoranda, briefs, and oral argument of desired to assist the Court in ths study and consideration of this substantial record. In the event of any appeals from the final orders of the Court on redetermination pursuant to this remand, the parties shall be entitled to use the present appellate record (and briefs) supplemented as necessary without the necessity of reproducing it.

VACATED AND REMANDED.

APPENDIX E

Amendment V, U.S. Constitution—No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

Rule 53, Federal Rules of Civil Procedure.

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but whe the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or

to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceeding in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of rference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties of their

attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice of the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to

him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the

parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

APPENDIX G

Second Specification

The Trial Court erred in refusing to provide in its judgment a credit in favor of Robertson Construction Company for the money represented by the overcharge to Robertson occasioned by the weighing of the asphalt aggregate with the OA 90 in it, for the substantial evidence establishes that Robertson was charged twice for the same oil (R. 179; 180).

Third Specification

The Trial Court erred in refusing to provide in its judgment a credit in favor of Robertson Construction Company for the money represented by the overcharge to Robertson of 20¢ a gallon rather than 17¢ a gallon for the OA 90 oil (R. 181).

Fourth Specification

The Trial Court erred in refusing to provide in its judgment a credit in favor of Robertson Construction Company for the damages occasioned to it because of the conduct of Camp, in having to remove the flexible base, haul off the base, haul in new base, compacting the new base, and repriming the same. (R. 181).

APPENDIX H

First Specification in the Camp Case

The Trial Court erred in entering judgment against Appellant for asphalt billed to it by Appellee Camp in excess of approximately 45 tons (R. 186).

A. The parties to the agreement in question contemplated that approximately 4500 tons of asphalt would be required, and to allow a recovery in favor of Camp for the amount demanded by him, would be to alter the obvious import of the agreement and constitute a judicial re-writing of the contract and agreement between Robertson and Camp, under which the asphalt was furnished.

B. The uncontroverted testimony of the witnesses Elliott Maltzman, Donald Moreau, Bert H. Camp and Stacy McKnight establishes that no more than approximately 4500 tons of asphalt could have possibly gone into the streets.

1. The Trial Court erred in overruling Appellant's objections (R. 178) to the Findings of the Special Master numbered three, four and fiice.

2. The Trial Court erred in refusing to adopt the Appellant's Requested Findings of Facts numbered one, two, three, four and five, for the substantial evi-

dence (adduced from Appellant's and Appellee's witnesses) is in support of the Requested findings and not the findings of the Special Master. (R. 172).

Second Specification in the Geer Case

The Trial Court erred in not finding that the Robertson Construction Company had overpaid Appellee, under the contract agreement of the parties, sums in excess of Thirty Three Thousand Five Hundred Sixty Three and No/100 Dollars ($33,563.00), and failing to allow Robertson a recovery or offset against Geer for that amount.

A. The evidence establishes that the parties contemplated that the dirt work contract wold cost Thirty Two Thousand Seven Hundred Seventy Five and No/100 Dollars ($32,775.00), and Robertson Construction Company has paid Odell Geer, to date, in excess of One Hundred Sixty Eight Thousand and No/100 Dollars ($168,000.00), and is therefore entitled to a judgment against Odell Geer for the balance.

B. It was totally without the contemplation of of the parties that the work contracted for with Odell Geer would cost the sum of Two Hundred Thousand Four Hundred Ninety Eight and 25/100 Dollars ($200,498.25), being the amount already paid by Robertson Construction Company to Odell Geer, and the Thirty Two Thousand Four Hundred Ninety

Eight and 25/100 Dollars ($32,498.25), claimed by Odell Geer to be still due and owing him.

APPENDIX I

SMITH V. DENTAL PRODUCTS CO. INC., et al

NO. 9461

Circuit Court of Appeals, Seventh Circuit

June 8, 1948

LINDLEY, District Judge.

Following the mandate of this court, as ordered in Smith v. Dental Products Co., 7 Cir., 140 F. 2d 140, the District Court, having entered a decree enjoining defendants from using the trade-marks of plaintiff and from continuing unfair competition, referred the cause to a master to take and report an accounting as to the profits and damages for infringement of trade-marks and unfair competition incurred by plaintiff during the period of some nine years following February 10, 1936. The master heard evidence at various times and, according to the transcript, on January 18, 1946, the parties agreeing, declared the proofs closed. He remarked, however, that if, after he had been able to examine the record, he should deem the evidence insufficient, he would not foreclose himself from the right to require further evidence. This reservation, he said, he made because of the broad differences between the parties and the different conclusions of the respective auditors. Thereafter, before making any findings or report, the master died. A transcript of

the evidence submitted before him, certified as correct by a private reporter, was later lodged with the District Judge.

On September 13, 1964, the court entered an order referring the cause to another master but two months later vacated it. Thereafter, on June 25, 1947, after the respective parties had presented their written briefs and arguments, the court, after considering the transcript then in its possession, entered final judgment against the corporate defendant, without special findings of fact or conclusions of law but including in the formal judgment a finding that 'plaintiff is entitled to recover on the basis of reasonable royalties for the period' in question and is 'hereby awarded the sum of $60,000 as profits and damages for trade-mark infringement and unfair competition', interest at 6% and costs.

Defendant now asserts that the District Court erred in failing to make special findings of fact and conclusions of law, as required by Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c; that, inasmuch as the master to whom the cause had been referred died before making a report, findings or recommendations, it was the duty of the court either to refer the cause to a second master for the purpose of a hearing de novo or to hear evidence itself; that the entry of judgment upon the transcript of testimony before the master and in the absence of findings by the master constitute deprivation of due

process of law, and that the judgment is contrary to the law and the evidence.

Under the Federal Rules of Civil Procedure (52(a)) the court 'shall find the facts specifically and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.' This rule has been considered in Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 S. Ct. 517, 84 L. Ed. 774; Bowles v. Russell Packing Co., 7 Cir., 140 F. 2d 354; Bank of Madison v. Graber, et al., 7 Cir., 158 F. 2d 137; Dearborn National Casualty Co. v. Consumers Petroleum Co., 7 Cir., 164 F. 2d 332 and in various decisions in the different circuits in agreement with the announcements of the cases cited. It is clear from these decisions that the requirements of the Federal Rules of Civil Procedure that the District Court make findings of fact and state conclusions of law must be reasonably complied with. As this court has said, 'a fair compliance with this rule is mandatory.' (140 F. 2d 355. 'These are * * * mandatory provisions which should be respected; they are not meaningless words'; "findings of fact on every material issue are a statutory requirement.' (158 F. 2d 141) 'There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the court. Kelley, et al v. Everglades Drainage District, 319 U.S. 415, 420, 422, 63 S. Ct. 1141, 87 L. Ed. 1485.' (164 F. 2d 333) Clearly the ultimate finding of liability is not fair compliance and the failure of the District Court in this respect constitutes error under the facts of the case.

Plaintiff has submitted various citations to the effect that failure to comply with the rule is not fatal, if included in the judgment or opinion are findings and conclusions sufficient to constitute substantial compliance. Undoubtedly the rule does not require always the strictest technical compliance and the situation may be such that, by findings and conclusions in a memorandum of the trial court, substantial compliance is reflected, in which instance there is no error. Here there was no opinion, no memorandum of fact and law but only the ultimate finding.

We are confronted with another serious question, this is, the effect of the master's death before he had made a report. The evidence was controverted; several hearings were had, controverted testimony was submitted and the master himself remarked that the status was such that he might require the submission of further evidence. In other words, the master's judgment upon the creditability of the witnesses appearing, we can never know. The rules contemplate that the District Court shall approve the findings of the master 'unless clearly erroneous', but what the master thought about the witnesses, what he would have found as a matter of fact as to the verity of the testimony, matters which are part and parcel of the purpose of the reference to the master to make findings and report to the court, are absent, and the reference, so far as legal effect is concerned, is a nullity.

Nor did the District Court see the witnesses. In Buchsbaum & Co. v. Federal Trade Commission,

7 Cir., 153 F. 2d 85, 87, this court dealt with a similar situation. There a trial examiner of the Federal Trade Commission died before rendering his decision. We said: 'The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available for that purpose, * * * Here there is no claim by anyone that the witnesses were unavailable, and counsel has cited no decision of our Supreme Court which in any way abrogates the ruling in the Ohio Bell Telephone case (Ohio Bell Telephone Co. v. Public Utilities Comm., 310 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093) and the Morgan case (Morgan v. United States, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. (1129), supra, both of which cases hold that a failure in this respect would amount to a failure of due process.' The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard. In Morgan v. United States, 298 U. S. 468, at page 480, 56 S. CC., 906, 911, 80 L. Ed. 1288, the court said: 'There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (265 U.S. 274, 44 S. Ct., 565, 68 L. Ed. 1016). Facts and circumstances which ought to be

considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are neded to sustain the order. * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.' See also In re Rubin and Lipman, D. C., 215 F. 669; McAllen v. Souza, 24 Cal. App. 2d 247, 74 P. 2d 853; People v. Lewe, 383 Ill. 549 50 N. E., 2d 577; Wainright v. P. H. and F. M. Roots Company, 176 Ind. 682, 97 N. E. 8; Labonte v. Lacasse, 78 N. H. 489, 102 A. 540; Hawley v. Priest Rapids Ice & Cold Storage Co., 172 Wash. 71 19 P. 2d 400. We think it was the duty of the District Court, in the absence of findings and report from the master, in order to afford the parties a hearing within the recognized legal meaning of that word, to direct a trial de novo before another master or before itself.

In this view of the case, it is unnecessary to consider, in fact there are not presented, any other question pertinent or necessary to our decision.

The judgment is reversed with directions to proceed in accordance with the announcements herein."

Office-Supreme Court, U.S.
FILED
AUG 18 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 318

W.R.B. CORPORATION, ET AL., d/b/a ROBERTSON CONSTRUCTION COMPANY, ET AL

Petitioners,

v.

ODELL GEER, d/b/a ODELL GEER COMPANY, AND P. H. (BERT) CAMP, d/b/a B.H.C. MATERIALS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Respondent's Reply to "Jurisdiction"

In view of the very broad powers of this Court, Respondents do not, of course, contend that it lacks jurisdiction of this case, but they respectfully submit that the Court should not take jurisdiction because the sole question presented was not raised in the trial Court and was, in fact, effectively waived

by Petitioners. Furthermore, even in the absence of waiver, the question should be decided favorably to Respondents.

In the portion of the Petition styled "Questions Presented," Petitioners concede that the sole question offered for consideration is whether or not the "careful and experienced trial Judge"[1] committed reversible error in failing to order a complete hearing de novo before a successor Master when the original Master died after hearing evidence but before making his report. Petitioners contend that there was a denial of due process solely because the successor Master based his findings on the transcript of the evidence taken by the original Master, and did not personally see and hear the witnesses.

Respondents do not believe that this contention is correct as a general proposition of law, but it is never reached in this case because the record shows beyond peradventure that Petitioners waived any right they may have had to secure a de novo hearing. As will be shown under "Reply to Reasons for Granting the Writ,"[2] Petitioners in effect acquiesced in the order appointing the successor Master and in everything that was done pursuant to it. In fact, Petitioners even requested that additional findings and conclusions be made from the same record of which they are now complaining, and they did not complain of the failure to have a de novo hearing until they filed their brief in the Court of Appeals.

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[1] He is so described in the opinion of the Court of Appeals in this case (313 F. 2d 752).

[2] Infra, pp. 6-18.

In view of the circumstances the Court of Appeals correctly stated that

> "... (T) here is no basis for the belated charge now made before us that the District Court erred in not requiring a complete or partial rehearing of the evidence before the successor Master. . . . (313 F. 2d 752).

Such waiver, without more, was held sufficiently to distinquish the case at bar from *Smith v. Dental Products Co.*, 168 F. 2d 516 (7th Cir. 1948), upon which Petitioners rely.

Petitioners have not, however, cited any authority to the effect that it is a denial of due process for the trier of the facts to find them from a written record instead of hearing the witness testify. It is therefore believed that even in the absence of waiver the trial Court did not commit reversible error.

As stated, the question brought forward in the Petition was not presented to the trial Court, and Respondents respectfully submit that it would work a great injustice on them and would pervert the rules of ordinary procedure to grant the writ in order to rule on a question not fairly presented to the Trial Court.

Reply to "Questions Presented" and "Statement"

The portions of the Petition styled "Questions Presented" and "Statement" of the nature of the case do not include the controlling facts upon which the decision of the Court of Appeals was based. Its

opinion on the first appeal clearly shows that the Court held that, by their affirmative acts and their omissions in the Trial Court, the Petitioners waived any objection they might otherwise have had to the absence of a de novo hearing, and that in the Trial Court they evidenced a complete willingness for the transcript of the testimony taken before the first Master to be the sole basis for all fact findings.[3] Such findings by the Court of Appeals are abundantly supported by the record.

Suffice it to say at this point that Petitioners did not object to the order directing the successor Master to base his findings on the record which had already been made and on such additional testimony as he deemed it desirable to take; that they failed to offer any additional evidence or to request a hearing for that purpose; that they filed objections to the report of the successor Master on the ground of lack or insufficiency of evidence and requested additional findings from the record to which they are now objecting; that they attended the hearing on the report and made no objection to its being based on the original record; and that they made their first objection to such procedure when they filed their brief in the Court of Appeals.

Respondents call particular attention to the fact that after the reports of the successor Master were filed and copies had been delivered to all parties,

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[3] These findings will be set out in the "Reply to 'Reasons for Granting the Writ.'" Infra, pp. 6-18.

Petitioners filed objections to the reports in both cases, the first paragraph of such instrument filed by them in the Geer case containing the following language:

> "Now comes W. R. B. Corporation et al, Plaintiffs, . . . and objects to the Report of the Special Master . . ., and respectfully requests the Court to correct certain Findings of Fact and Conclusions of Law, *and to make additional findings of Fact designated herein, . . . and then to enter judgment upon said additional Findings of Fact, Conclusions of law, as plead for in Robertson's Pleadings on file herein.*"[1]

(R. 90)

There are then set out seventeen objections to the Special Master's Findings of Fact, all based on no evidence or insufficiency of the evidence. Following such objections are seven different and contrary findings of fact which Petitioners then requested the Trial Court to make. The instrument concludes with the following prayer:

> "Robertson Construction Company moves this Court to sustain its objections to the findings of the Special Master, *to make the additional findings requested herein, and to enter judgment in accordance with said corrections, findings and conclusions.*" (R. 102)

The objections filed by Petitioners in the Camp case were similar in language, outline, prayer and

[1] Unless otherwise noted, all italics in this brief are ours.

effect to those in the Geer case above set out. (R. 178-184)

At no time while the case was in the Trial Court did Petitioners indicate to the Court that they were dissatisfied with the evidence on which the report was based or with the fact that the successor Master did not himself see the witnesses. The trial Judge was entitled to believe, and assuredly did believe, that the only dissatisfaction Petitioners had with the report was in the findings the Master made and the conclusions he drew from them.

Reply to "Reasons for Granting the Writ"

Respondents respectfully submit that the Court of Appeals correctly held that if Petitioners ever had a tenable objection to the Master's reports on the ground that he did not see and hear the witnesses, they had waived any such objection. Such waiver is shown both by failure to object and by affirmative acts which were found and noted by the Court of Appeals in its opinion and which are fully supported by the record. The following facts are controlling:

1. *Failure to object to order appointing successor Master.*

> ". . . It was further ordered (by the trial Court) that the successor Master 'shall make a report to this Court of his findings of fact and conclusions of law based upon the evidence heretofore taken by the (original Master) and upon the record of such evidence with the power, however, to take any further evidence which (the successor Master) may deem neces-

sary.' No objection was made by any party to the appointment of a successor Master, the entry of this order or any of its terms. *Specifically no objection or exception was taken to the provision that the successor Master should determine the controversy on the basis of the existing record.* . . . " (313 F. 2d. 752).

By their failure to object to any of the provisions of the order Petitioners in effect agreed that the successor Master might base his report upon the evidence taken by the original Master, and the trial Judge was certainly entitled to believe that Petitioners were satisfied with the order.

2. *Several months elapsed between appointment of successor Master and filing of his reports, during which time Petitioners took no action.* "The successor Master, after consideration of the existing record—including the memorandum briefs and arguments previously filed—took the case under advisement. Several months thereafter he rendered a separate report in each case containing detailed findings of fact and conclusions of law. . . ." (313 F. 3d. 752).[3]

3. *Petitioners' failure to offer further evidence.* " . . . It was further ordered that the successor Master (should have) the power, however, to take any further evidence which (the successor Master) may deem necessary.' . . .

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[3] While the opinion does not give the exact dates, the record shows that the order appointing the successor Master was filed with the Clerk on October 18, 1961, and the Clerk promptly sent copies thereof to all counsel of record, but the Special Master's reports were not filed until over four months later, on February 21, 1962.

Although the order allowed the taking or retaking of further testimony, neither party offered any additional evidence, nor was any request made that hearings for such purpose be had. . . ." (313 F. 2d 752)

4. *Exceptions filed by Petitioners to Master's reports.*

"The successor Master . . . rendered a separate report in each case containing detailed findings of fact and conclusions of law. To each report the Contractor (the present Appellant)[*] filed numerous detailed exceptions.

These generally attacked the specific findings because not supported by sufficient or any evidence and because such findings were clearly erroneous. . . . *No exception or objection was urged that the successor Master had reached his conclusions based upon the prior record.* . . ." (313 F. 2d. 752).

Beyond any question the objections on other grounds to the Master's findings and conclusions constituted a waiver of any objection Petitioners may have had to the fact that they were based on the prior record.

5. *Petitioners' request for additional findings.*

" . . . . These (exceptions filed by Petitioners to the Master's reports) were also amplified by specific request for additional findings, conclusions of law, or both. . . ." (313 F. 2d 752).

Surely Petitioners' request for additional findings and conclusions from the same record they are now

[*] Petitioners in this Court.

attacking amounted to a complete approval of it and a consequent waiver of the right to object to its use as the basis for all fact finding.

6. *Attendance at hearing on Master's report and failure to object.*

> "The District Court thereafter held a hearing on the exceptions to the Master's report. This was attended by counsel and the successor Master. . . .
>
> It bears repeating that *at no time prior to the entry by the District Court of the order confirming the reports (except as modified) of the successor Master was objection or exception ever made by the Appellant (Petitioners)* . . . to his consideration and determination of the controversy on the basis of the initial existing record. . . ." (313 F. 2d 752).

7. *Failure to raise question in Trial Court.*

> " . . . Indeed, no such objections were made at any time prior to the filing of the brief in the consolidated appeals in this Court." (313 F. 2d 752).

It is too well settled to require argument or citation of authority that as a general rule the Trial Court is entitled to pass on all objections which a party may have to any portion of the proceedings and that such an objection comes too late if made for the first time in the Appellate Court. The Court of Appeals properly noted that the "careful and experienced trial Judge" would have provided for the appearance or re-appearance of any critical wit-

nesses for oral examination before the successor Master had either party requested it, and concluded that under the circumstances

> " . . . (T) here is no basis for the belated charge now made before us that the District Court erred in not requiring a complete or partial rehearing of the evidence before the successor Master. . . ." (313 F. 2d 752).

8. First request to the trial Court for de novo hearing came after remand of case for other purposes.

The Court of Appeals remanded the cause to the District Court in order to permit the trial Judge to examine the Master's findings and to determine whether or not they were "clearly erroneous" as provided in F. R. Civ. P. 53(e)(2). The narrow limits within which he was to operate after the case was remanded are shown by the concluding portion of the opinion of the Court of Appeals:

> " . . . (T) he final judgments must be vacated and the causes remanded for such determination of all the objections to the Master's reports which were raised and pending by any or all of the parties. . . . (313 F. 2d 753).

> " . . . (T)he Court is entitled to call on counsel for further written memoranda, briefs, and oral argument if desired to assist the Court in the study and consideration of this substantial record. . . . " (313 F. 2d 754).

Thus, the order remanding the cause permitted the Trial Court to pass on only those objections which had already been filed and to request counsel

to furnish only such "written memoranda, briefs and oral argument" as he might desire. Conspicuously absent is any mention of the filing of additional objections or the taking of further testimony. It was therefore entirely too late when the case got back to the Trial Court for Petitioners to file their motions for a de novo hearing.

It is apparent from the above that Petitioners not only made no objection to the Master's using the prior record as the basis for his findings and conclusions but that on the contrary they adopted it by requesting its use for further findings and conclusions. To hold that such conduct does not constitute a waiver, or does not constitute an implied agreement that the record made before the first Master be the sole basis for fact finding, would permit a litigant, as here, to refrain from requesting a de novo hearing or permission to offer further evidence before the successor Master, in the hope that findings favorable to him would be made by the Master, or if not, then by the Trial Court, in which event the litigant would accept the favorable findings and judgment thereon; but if such findings and judgment should be adverse to him, he would then call upon the Appellate Courts to set aside the entire proceedings and give him another chance.

Respondents have already called attention to the fact that the remand of the cases on the first appeal was for a very limited purpose, and that the Court of Appeals specifically overruled Petitioner's contention relative to a de novo hearing. The opinion makes it quite clear that no further testimony was to be

received, and that the only purpose of the remand was to make sure that the Trial Judge properly fulfilled his judicial function in ruling upon the objections to the Master's reports. Therefore the motion for a de novo hearing filed by the Petitioners in the Trial Court, after the remand, came after a complete waiver, and it was properly overruled by the Trial Court.

Petitioners apparently contend that a sine qua non for fact finding is the personal observation of the witnesses by the trier of the facts, and that this requirement cannot be waived. No authority is, of course, cited for this rather novel contention. It is conceivable that a case might be submitted to a court, a jury or a Master on depositions only, and that no party would offer to produce a witness to testify in person. Is it possible that under such circumstances the Petitioners would urge that their rights under the Fifth Amendment had been violated? Depositions and answers to interrogatories are quite often a part of the evidence in cases tried under the present rules, and it would seem that the only difference between such a case and this case is one of degree. In any case where depositions or answers to interrogatories are used the trier of the facts does not see or hear one or more of the witnesses.

For the sake of argument and further consideration of the cases cited by Petitioners, let it now be assumed that they had made objections to the order appointing the successor Master, Tom Conway, and had made timely demand in the Trial Court for a

de novo hearing, which had been refused, and let it be further assumed that Petitioners did nothing to waive such objections and demand. Respondents respectfully submit that, even in this event, the judgments of the Trial Court and of the Court of Appeals would be supported by the weight of authority and sound reasoning.

There are apparently only two cases which directly present or discuss the question of whether a de novo hearing is necessary when a successor Master is appointed to succeed a Special Master, appointed under Rule 53, who has heard the testimony but who dies or becomes incapacitated before making his report. Both cases are discussed in the Petition.

According to Corpus Juris Secundum, Vol. 35B, Page 220, the rule is that in such instances the Trial Court "may properly direct a successor Master to base his findings on the evidence taken by his predecessor." As authority for this statement one of the cases referred to is cited, namely, the District of Columbia Circuit Court case of *D. M. W. Contracting Co. v. Stolz*, 158 F. 2d 405, (hereinafter referred to as the *Stolz case.)* Petition for writ of certiorari in that case was denied by this Honorable Court. 330 U. S. 839, 67 S. Ct. 980, 91 L. Ed. 1286.

In the *Stolz case* the Master, (called "Auditor" in the opinion) who heard the testimony, died before making his report. The Trial Court appointed a successor and instructed him "to file his report upon the existing record." *The Appellants filed timely ob-*

jections to this order and requested a de novo hearing, which request was overruled. When the Master's report was filed, the Appellants filed exceptions thereto and a motion to suppress it for want of a de novo hearing, all of which the Trial Court overruled. The Trial Court then approved the Master's findings and entered judgment thereon. There was thus no element of waiver or acquiescence in the *Stolz case*, despite which fact the Court held that the report of the successor Master was legal and binding even though based solely on testimony of witnesses he had not seen or heard.

The opinion of the Court of Appeals in the *Stolz case*, affirming the judgment and holding that the order of reference was proper and that no further evidence was necessary, was not based alone on expediency, as Petitioners have stated on Page 9 of their Petition. On the contrary, the decision is based upon the Court's careful interpretation of Rule 53. After setting out the pertinent provisions of Rule 53, the opinion continues:

> "It appears from the foregoing that it is the trial court in such a case who makes the final determination of all the issues. The report of the master is advisory only and is without effect until confirmed by the court. For while he is charged with accepting the master's findings of fact unless clearly erroneous, it is necessary for him to review the transcript of the proceedings to determine if such error has been made, and when objection is taken to the report, as was done here, he is bound to review the transcript of the proceedings, evidence and exhibits to determine for himself whether the

master's report should be accepted, rejected wholly or partly, modified, recommitted with instructions, or whether he should receive further evidence. And in no instance is he bound by the master's conclusions of law. The effect is the same whether or not the parties consented to the reference.

"This being the case, it does not seem to us to be necessary to have the master who makes the findings hear the testimony and take evidence, and his report should be given the same effect as the report of a master before whom the entire proceeding took place." (158 F. 2d 407).

The other case which discusses this particular problem is *Smith v. Dental Products Co.*, 168 F. 2d 516 (7th Cir. 1948), relied on by Petitioners. That case does not stand for the proposition that after the death of a Master a de novo hearing before a successor Master is necessary. On the contrary, before that question was reached or discussed the Court of Appeals indicated, if it did not in fact hold, that the trial Court's judgment must be reversed because no findings of fact or conclusions of law were filed, as required by Rule 52.[1] No such situation is presented by the case at bar, for here the Master filed findings and conclusions, and they were approved by the Trial Court with some changes.

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[1] ". . . It is clear from these decisions that the requirement of the Federal Rules of Civil Procedure that the District Court make findings of fact and state conclusions of law must be reasonably complied with. . . . Clearly the ultimate finding of liability is not fair compliance and the failure of the District Court in this respect constitutes error under the facts of the case." (168 F. 2d 518).

Since no findings of fact or conclusions of law were made by a Master or by the Trial Court in the *Smith case*, it is quite obvious that anything which the Court said regarding the necessity for basing findings and conclusions on the testimony of witnesses seen and heard by the Master is necessarily dictum. The Court of Appeals in that case could not authoritatively state the essentials for making valid findings of fact and conclusions of law because that question was not before it.

So far as Respondents can determine, no petition for writ of certiorari was filed in that case. In view of the inexorable requirement of Rule 52 that findings and conclusions be filed and of the total disregard of such requirement by the Trial Court in the *Smith case*, it is easy to understand why no petition for a writ was filed to review the judgment of the Court of Appeals which reversed the trial Court's judgment.

The cases cited by the Court in the *Smith case* in support of its discussion of the personal appearance of all witnesses before a Master are readily distinguishable from the case at bar. It is noteworthy that none of them involved the identical situation presented by this case—the death or incapacity of a Master appointed under Rule 53 before making his report. In fact, in most instances the proceedings were administrative and not judicial. Thus, in *S. Buchsbaum & Co. v. Federal Trade Commission*, 153 F. 2d 85 (7th Cir. 1946), the original hearing was before an examiner, and neither he nor the Com-

mission itself had seen or heard the witnesses. In *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1935), the Secretary of Agriculture entered an order *without having heard or read any of the evidence* and without having heard the oral arguments or having considered the briefs. In fact, it appears from the opinion that "the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department." (80 L. Ed. 1293).

The vice in the order involved in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1936), was that the Commission had based its order fixing the value of the company's property in part on information secretly collected and never disclosed. No one would contend that the telephone company in that case had received the character of hearing to which it was entitled. On Pages 12-14 of the Petition for Certiorari petitioners cite several cases for the proposition that the findings of a Master should not be disturbed unless clearly erroneous. Respondents do not, of course, contend for a contrary rule.

Under Point 3 of their "Reasons for Granting the Writ," Petitioners say that the "clearly erroneous" test has not been applied to the Special Master's findings by the Trial Court and that it cannot be so applied because the Master who made the findings did not see and hear the witnesses. Respondents are unable to follow Petitioners' thinking on this point. The function of the trial Court to determine from the record whether or not the Master's findings were

clearly erroneous would be the same whether or not the Master who made the findings had seen and heard the witnesses. In neither case would the trial Court have seen or heard them, and Respondents submit that this contention of Petitioners is likewise without merit.

It is, therefore, Respondents' position that (1) there is no requirement in the Constitution or in the authorities that in a case such as this the successor Master must see and hear the witnesses—even though neither party requests that he do so—and that if he does not do so there is a lack of due process and (2) Petitioners waived the right to a de novo hearing (if they ever had any such right), and in effect acquiesced in the successor Master's finding the facts on the basis of the testimony taken by the original Master. Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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On this the 13th day of August, 1964, two copies of the foregoing Reply were mailed by me to each of the

counsel for Petitioners, namely: Robert C. Howell, Esq., Vaughn Building, Austin, Texas; Jake Jacobsen, Esq., Vaughn Building, Austin, Texas; and Arthur Mitchell, Esq., Suite 400, First Federal Savings Building, Austin, Texas.

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